September 2021

Decision in CPLR Article 78 proceedings - Branch, Steven (2012-08-20)

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of STEVEN BRANCH,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-12-ST3488 Index No. 850-12

Appearances: Steven Branch
Inmate No. 06-A-1889
Petitioner, Pro Se
Woodbourne Correctional Facility
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Woodbourne, NY 12788-1000

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Woodbourne Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated April 5, 2011

to deny petitioner discretionary release on parole. He is serving a term of two to four years for attempted assault in the second degree, arising out of a motor vehicle accident which occurred in May 2005, in which he drove the wrong way down a one way street, struck a motorcycle and seriously injuring the driver, and then fled the scene of the accident. He was on parole for a prior crime at the time of the accident, and the new sentence was imposed consecutively to the prior one. Among the arguments set forth in the petition, the petitioner alleges that the Parole Board failed to adhere to the requirements of Executive Law § 259-i, and violated his right to due process. He also maintains that the Parole Board failed to comply with certain legislation enacted in 2011 which amended the Executive Law with regard to parole release decisions. In his administrative appeal he alleges that the Parole Board failed to consider his therapeutic, educational and vocational programming, including the acquisition of a certificate of earned eligibility. He maintains that he took responsibility for his crime through his guilty plea; that there is no evidence that he is a danger to society; that he has made efforts to rehabilitate himself; and that he has a strong support network in the community.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Denied 24 months, next appearance April 2013.
>
> "Not withstanding the EEC, after a review of the record and interview, the panel has determined that if released at this time, there is a reasonable probability that you would not live and remain at liberty without again violating the law and your release would be incompatible with the welfare of society. This decision is based on the following factors: your instant offense attempted assault second degree in which you drove a vehicle and struck a motorcyclist causing injury and then fled and did so

> while on parole. Your history began as a juvenile in 1969, includes a YO robbery, four felonies, violence, prior prison and failure at community supervision. Note is made of your sentencing minutes, programming, disciplinary record and all other required factors. You clearly failed to benefit from prior efforts at rehabilitation. Parole is denied."

As relevant here, the 2011 legislation (see L 2011 ch 62, Part C, Subpart A, § 38-b, et seq.) amended the Executive Law, as it relates to parole determinations in two ways. First, Executive Law § 259-c was revised to abolish the old guideline criteria, and establish a review process that would place greater emphasis on assessing the degree to which inmates have been rehabilitated, and the probability that they would be able to remain crime-free if released. Said section now recites: "[t]he state board of parole shall [] (4) establish written procedures for its use in making parole decisions as required by law. Such written procedures shall incorporate risk and needs principles to measure the rehabilitation of persons appearing before the board, the likelihood of success of such persons upon release, and assist members of the state board of parole in determining which inmates may be released to parole supervision" (L 2011 ch 62, Part C, Subpart A, § 38-b). This amendment was made effective six months after its adoption on March 31, 2011, that is, on October 1, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49-[f]). In the second change, Executive 259-i (2) (c) was amended to incorporate into one section the eight factors which the Parole Board was to consider in making release determinations (see L 2011 ch 62, Part C, Subpart A, § 28-f-1). This amendment was effective immediately upon its adoption on March 31, 2011 (see L 2011, ch 62, Part C, Subpart A, § 49). However, the latter amendment did not result in a substantive change in the criteria which the Parole Board should consider in rendering its decision.

With regard to the issue of retroactivity of the 2011 legislation, as noted, the parole determination here was made on January 25, 2011, well before the legislation was enacted, and well before the effective date of the amendment to Executive Law 259-c (4). Generally speaking, statutory amendments " are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated" (Matter of Gleason v Michael Vee Ltd., 96 NY2d 117, 122 [2001], citing People v Oliver, 1 NY2d 152, 157). While remedial legislation often will be applied retroactively to carry out its beneficial purpose, this is not the case where the Legislature "has made a specific pronouncement about retroactive effect" (see Matter of Gleason v Michael Vee Ltd., supra, at 122). In this instance, as the Court observed in Matter of Hamilton v New York State Division of Parole (943 NYS2d 731, Platkin, Richard M.,Sup. Ct., Albany Co., 2012), "the State Legislature considered the question of the effectiveness of the 2011 Amendments and determined that the new procedures contemplated by the amendments to Executive Law § 259-c (4) should not be given effect with respect to administrative proceedings conducted prior to October 1, 2011." This Court agrees. Under such circumstances, there clearly was no Legislative intent that said amendments be applied retroactively to parole determinations rendered prior to October 1, 2011 (see id.; see also Matter of Tafari v Evans, 2012 NY Slip Op 51355U [Sup. Ct., Franklin Co., 2012])

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept., 2001]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part

of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]; see also Matter of Graziano v Evans, 90 AD3d 1367, 1369 [3d Dept., 2011]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's possession of a certificate of earned eligibility, his institutional programming and disciplinary record, and his plans upon release, including residing with his brother in Queens and going back to his job as a sheet metal worker. The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Siao-Pao, 11 NY3d 773 [2008]; Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Matos v New York State Board of Parole, 87 AD3d 1193 [3d Dept., 2011]; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d 629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining

the inmate's application, or to expressly discuss each one (see Matter of MacKenzie v Evans, supra; Matter of Matos v New York State Board of Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [3rd Dept., 2010]; Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept., 2008]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

It is well settled that receipt of a certificate of earned eligibility does not serve as a guarantee of release (Matter of Dorman v New York State Board of Parole, 30 AD3d 880 [3rd Dept., 2006]; Matter of Pearl v New York State Division of Parole, 25 AD3d 1058 [3rd Dept., 2006]).

Petitioner's claims that the determination to deny parole is tantamount to a resentencing, in violation of the double jeopardy clauses's prohibition against multiple punishments are conclusory and without merit (see Matter of Bockeno v New York State Parole Board, 227 AD2d 751 [3rd Dept., 1996]; Matter of Crews v New York State Executive

Department Board of Appeals Unit, 281 AD2d 672 [3rd Dept., 2001]; Matter of Evans v Dennison, 13 Misc3d 1236A, [Sup. Ct., West. Co., 2006]; Matter of Kalwasinski v Paterson, 80 AD3d 1065, 1066 [3d Dept., 2011]; Matter of Carter v Evans, 81 AD3d 1031, 1031 [3d Dept., 2011]; Matter of Valentino v Evans, 92 AD3d 1054 [3d Dept., 2012]). The fact that an inmate has served his or her minimum sentence does not confer upon the inmate a protected liberty interest in parole release (see Matter of Motti v Alexander, 54 AD3d 1114, 1115 [3rd Dept., 2008]). The Parole Board is vested with the discretion to determine whether release was appropriate notwithstanding the fact that the sentencing court set the minimum term of petitioner's sentence (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000]; Matter of Gomez v New York State Division of Parole, 87 AD3d 1197 [3d Dept., 2011]; Matter of Cody v Dennison, 33 AD2d 1141, 1142 [3rd Dept., 2006] lv denied 8 NY3d 802 [2007]; Matter of Burress v Dennison, 37 AD3d 930 [3rd Dept., 2007]).

With regard to petitioner's arguments concerning an alleged violation of his right to due process, the Court first observes that there is no inherent right to parole under the constitution of either the United States or the State of New York (see Greenholtz v Inmates of the Nebraska Penal and Correctional Complex, 442 US 1, 7 [1979]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 73, supra). It has been repeatedly held that Executive Law § 259-i does not create in any prisoner an entitlement to, or a legitimate expectation of, release; therefore, no constitutionally protected liberty interests are implicated by the Parole Board's exercise of its discretion to deny parole (see Barna v Travis, 239 F3d 169, 171 [2d Cir., 2001]; Marvin v Goord, 255 F3d 40, 44 [2d Cir., 2001]; Boothe v Hammock, 605 F2d 661, 664 [2d Cir., 1979]; Paunetto v Hammock, 516 F Supp 1367, 1367-

1368 [SD NY, 1981]; Matter of Russo v New York State Bd. of Parole, 50 NY2d 69, 75-76, supra, Matter of Gamez v Dennison, 18 AD3d 1099 [3rd Dept., 2005]; Matter of Lozada v New York State Div. of Parole, 36 AD3d 1046, 1046 [3rd Dept., 2007]). The Court, accordingly, finds no due process violation.

In addition, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

The Court has reviewed petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute

entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: August 20, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated February 27, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated April 26, 2012, Supporting Papers and Exhibits